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ABSTRACT

In response to requests for information relating to the emotional maltreatment of children, the Region 6 Child Abuse and Neglect Resource Center produced a videotape depicting a fictional courtroom hearing conducted to determine whether or not a child should be temporarily removed from his parents' custody on the grounds of emotional maltreatment. The aim of the simulation was to highlight key issues and procedures surrounding the testimony of an expert psychiatric witness in the effort to familiarize lawyers, psychiatrists, psychologists, social workers, and others with the complexities involved. The specific type of maltreatment alleged in the testimony involved the parents' neglect of their child's emotional needs as implied by a diagnosis of previous nonorganic failure to thrive. This manual, designed to accompany the videotape, focuses on the statutory and administrative framework for state intervention and provides descriptions of legal proceedings before trial, participants in the trial, and the expert psychiatric witness at the trial. Appendices provide a list of child behaviors and parental behaviors indicative of maltreatment and a flowchart illustrating a systematic approach to juvenile court procedures involved in processing cases of emotional abuse. Also included in the manual are tips on courtroom demeanor, intended to help the expert respond to direct- and cross-examination with maximum credibility. (RH)

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The Psychiatric Expert in The Case of an Emotionally Maltreated Child

Videotape Manual

James L. Spearly, J.D.

Frank Foerster, J.D.

Sue Berry, J.D.

Region VI Child Abuse and Neglect Resource Center

The University of Texas

at Austin

Austin, Texas

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TABLE OF CONTENTS

	Page
Foreword	iii
Acknowledgements	iv
Statement for Videotape Viewers	v
Introduction	1
I. State Intervention: The Statutory and Administrative Framework	4
A. Statutorially Mandated Reporting	4
B. What is Emotional Maltreatment?	5
1. Definitional Approaches	5
2. "Failure-to-Thrive"	10
C. State Action Pursuant to Reported Abuse	13
1. Investigation	13
2. Court Action	15
3. Treatment Considerations in "Failure-to-Thrive" Cases	17
II. Legal Proceedings Before Trial	18
A. The Petition and Service of Process	19
B. Pre-trial Discovery	19
1. Interrogatories	20
2. Admissions	21
3. Depositions	21
III. The Participants in the Trial	22
A. The Judge	22
B. The Prosecuting Attorney	23
C. The Parents' Attorney	24

		Page
D.	The Child's Attorney or Guardian Ad Litem	25
E.	The Parents.....	25
IV.	The Psychiatric Expert Witness at Trial.....	26
A.	What is an Expert Witness?.....	26
B.	Qualifying as an Expert Witness.....	28
C.	The Psychiatric Report and Presentation of Testimony.....	30
D.	Evidentiary Objections.....	34
1.	The Hearsay Rule (and Medical Records).....	34
2.	Leading Questions.....	35
E.	Courtroom Demeanor.....	36
Endnotes.....		39
Appendices.....		43

FOREWORD

The videotape, "The Psychiatrist As An Expert Witness In An Emotional Maltreatment Case," was developed by the Region VI Resource Center on Child Abuse and Neglect (RCCAN). The Resource Center is funded by the National Center on Child Abuse and Neglect and is located at the University of Texas at Austin, and is responsible for providing resources and technical assistance to five states: Arkansas, Louisiana, Oklahoma, New Mexico, and Texas.

Through its activities, the Center has received many requests for information relating to the emotional maltreatment of children. Of particular concern have been the issues raised when a case of this type is taken to court. In an effort to respond to these requests, the Center produced a videotape depicting a fictional courtroom hearing to determine if a child should be temporarily removed from his parents' custody on the grounds of emotional maltreatment. Our intention was to highlight the key issues and procedures surrounding the testimony of a psychiatric expert witness in an effort to familiarize lawyers, psychiatrists, psychologists, social workers, and others with the complexities involved.

ACKNOWLEDGEMENTS

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Special recognition should be given to Center staff Jackie Cox, Melody Krane, Helen Schlegel, and Julie Cunniff for assistance in research, editing, and final preparation of this document.

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STATEMENT FOR VIDEOTAPE VIEWERS

The videotape you are about to see is designed to present some of the issues and complexities encountered in a courtroom hearing to determine if a child has been emotionally maltreated by his parents. It depicts an adversarial hearing argued before a Judge who must decide whether to temporarily remove a six-year old child from the custody of his parents. To guide his decision, the Judge is following a "best interest of the child" standard. This dramatization does not involve a hearing to terminate parental rights.

The specific type of maltreatment alleged in the testimony presented involves the parents' neglect of their child's emotional needs as implied by a diagnosis of previous nonorganic failure to thrive. It is important to note that the only testimony being presented is that of a psychiatrist testifying for the state. An actual hearing would have other witnesses for the state, such as a psychologist, social worker, teacher, or neighbor of the family. In addition, the defense might present similar witnesses to testify on behalf of the parents. Thus, all of the evidence will not be before you, and no comment can be made on its sufficiency to justify removing the child from the parents' custody.

Because the videotape was produced for instructive purposes, it is more quickly paced than an actual trial. The points illustrated come in rapid succession and at times may appear overly dramatic in order to emphasize their importance. It is hoped that the total effect will be an educational one where the viewer comes away with a greater understanding of what to expect when asked to testify in an emotional maltreatment case.

INTRODUCTION

This manual and the accompanying videotape are designed to familiarize you with the role of the psychiatrist or psychologist as an expert witness in a hearing concerning the emotional maltreatment of a child. The Judge, who must decide whether the alleged maltreatment warrants temporary removal of the child from the custody of his parents, is legally responsible for determining what course of action will serve the best interests of the child. The Judge's decision will have a profound impact on the lives of the child, the parents, and any siblings. Given the weight of the matter, the Judge has an obvious need for the best possible information in making his decision. Since he is unlikely to have personal knowledge of the emotional condition of the child and its relationship to parental behavior, he will rely heavily on the opinions of others. Thus, the expert witness becomes a key figure in the decision-making process.

Legal proceedings involving a case of alleged emotional maltreatment may go through several stages, both prior to and following a determination that the child has been abused or neglected. The purpose of an adjudicatory hearing, a portion of which is illustrated by the videotape, is to determine whether the child is legally in need of the protection of the court. After receiving the evidence and hearing the testimony from both parties, the Judge must decide whether the facts meet the standards established by that state's legislature which authorize the court's protective intervention on behalf of the child. If the legal requirements are not met, the case will be dismissed with no further interference in the family relationships.

If the Judge determines that court intervention is legally justified, the court must make an administrative decision about the nature of that intervention. Depending upon the circumstances of the case, the court may order any one of the following modifications in the parent-child relationships:

1. The child may be left in the parental home under the protective supervision of the juvenile probation department or the department of social services; or

2. As above, with the further requirement that the parents obtain counseling or other services, or refrain from continuing certain associations or conduct; or

3. The child may be placed with relatives; or

4. The child may be made the ward of the state and placed temporarily in a foster home, or in a group home or residential treatment facility, with certain conditions or services specified by the court.

The authority of the juvenile court extends primarily to children. Therefore, the power which the court usually exercises over parents is the threat of removing the child if the parents refuse to comply with the court's orders (some courts rule parents in contempt for noncompliance). Courts are normally reluctant to take a child from its parents, but the threat of removal is frequently sufficient to coerce parental participation in counseling or other services which will hopefully rehabilitate the parent-child relationships. If after a certain period of time (often specified by statute) the court is persuaded that such rehabilitation is impossible, the court may honor a request to terminate parental rights in order to free the child for adoption.

The court's decisions, both whether to intervene and how, will in large part be determined by the testimony of the expert witness. Thus, it is particularly important for the expert to be prepared to present the

most critical information in an appropriate manner. This manual and the accompanying videotape are designed to assist the psychiatric expert witness in carrying out these responsibilities.

I. STATE INTERVENTION: THE STATUTORY AND ADMINISTRATIVE FRAMEWORK

A. Statutorially Mandated Reporting

Since the early 1960's, all fifty states have enacted laws which require the reporting of non-accidental injury and neglect of children. According to a survey by the Education Commission of the States, thirty-seven states now require that "emotional abuse" and/or "mental injury" be reported.[1] Although the original reporting statutes only required that medical personnel report suspected cases of child abuse, in recent years the base of mandated reporters has substantially broadened.[2] All fifty states require physicians and nurses to report suspected child abuse; eighteen states require reporting by "any person", or "any other person"; and thirty-three states specifically require reporting by mental health professionals.[3] All states provide immunity from liability if the report is made in good faith; and a majority of states also provide a penalty, criminal and/or civil, for failure to make a mandatory report.[4]

The precedent for imposing civil liability for failure to report abuse pursuant to a statutory mandate was created by the California Supreme Court in Landeros v. Flood.[5] The defendants in that case, a physician and a hospital, were charged with failure to diagnose and report what were apparently deliberately inflicted injuries to a child who had been brought in for treatment. After the child was released from treatment by the defendants, she sustained further severe injuries. Her foster parents brought suit on her behalf to recover damages for the injuries allegedly sustained as a result of the negligent failure to diagnose her as a victim of the battered child syndrome. After upholding the child's right to sue, the California Supreme Court remanded the case for determination of whether the published writings on the battered child

syndrome were sufficiently known within the medical community to sustain a charge of negligence in diagnosis.

While the facts of the Landeros case involved physical rather than emotional maltreatment, the negligence theory employed by the court could also be applied in an emotional abuse case. However, demonstrating subsequent emotional damage following an initial failure to diagnose emotional maltreatment would be very difficult. With the possible exception of the failure-to-thrive syndrome, types of emotional abuse and neglect provide much less certainty about the cause of the observed harm than do certain types of physical maltreatment.

B. What is Emotional Maltreatment?

1. Definitional Approaches

In order to report a case of emotional maltreatment, one must be able to identify it. At present, there is very little consensus about what particular circumstances justify state intervention into parent-child relationships alleged to involve emotional harm. Nevertheless, a variety of approaches have been suggested ranging from no intervention in these cases to intervention based on parental behavior, the child's condition, or both.

An example of a definition of emotional abuse described in terms of parental behavior and intent is provided by Brandt Steele in Working With Parents from a Psychiatric Point of View.[6] He defines emotional abuse as:

> ... the situation in which the caretaker of the infant or small child provides less of the warm, sensitive interaction than is necessary for the child's optimal healthy growth and development. Instead of being empathically aware of the child's state and needs and responding in appropriate fashion, the parent disregards the child's condition and acts in ways primarily oriented toward parental needs and convenience.

The Child Abuse Fact Sheet distributed to the general public by the Texas Department of Human Resources provides another example by defining emotional maltreatment as "failure to provide a child with love and affection."[7]

A definition which focuses solely on the behaviors and intentions of the parents is attractive to lawyers in that they are often called upon to specify the acts or omissions and motives of someone accused of offensive behavior. However, in the legal context, the focus is usually on some minimal standard of parental care rather than a requirement that parents promote their child's "optimal" development. The difficulty with this approach derives from the fact that some children develop without any serious emotional problems despite poor parenting. This presents the question of whether the court should intervene at all in such instances.

A second approach to defining emotional maltreatment emphasizes the condition and/or behavior of the child. Delinquency, truancy, or other behavioral problems at school may be indicators of maltreatment from this perspective. This definitional approach is attractive to social workers because it integrates theory with the actual referral networks through which cases are received. However, an approach which focuses solely on the child's condition or behavior fails to address the issue of causation. Non-abusive parents may also have delinquent children or children who present behavioral problems. And a child's emotional difficulties could be the result of other events or purely internal factors.

Most statutory attempts to define emotional maltreatment have emphasized parental behavior and intent while also stating the type of harm to the child which must result from that behavior. The U.S. Children's Bureau's Draft Model Child Protection Act provides an example of a typical

statutory provision:

> An "abused or neglected child" means a child whose physical or mental health or welfare is harmed or threatened with harm by the acts or omissions of his parent or other person responsible for his welfare.
>
> "Harm" to a child's health or welfare can occur when the parent or other person responsible for his welfare:
>
> inflicts or allows to be inflicted, upon the child, physical or mental injury...[8] (emphasis added).

Unlike many state statutes, the Model Act provides further clarification by specifying the nature of the term "mental injury":

> "Mental injury" means an injury to the intellectual or psychological capacity of a child as evidenced by an observable and substantial impairment in his ability to function within his normal range of performance and behavior, with due regard to his culture.[9]

Thus, the Model Act requires that the mental injury be clearly established by evidence of the condition and behavior of the child and be clearly attributable to the acts or omissions of the parents.

The language of the Model Act requires expert psychiatric or psychological examination and testimony to establish the causal relationship between the acts or omissions of the parents and the child's mental condition. An approach which does not require that emotional damage be caused by parental conduct has been presented by the American Bar Association Joint Commission on Juvenile Justice Standards.[10] The Joint Commission's draft standards would permit court intervention when:

> ... a child is suffering serious emotional damage, evidenced by severe anxiety, depression, or withdrawal, or untoward aggressive behavior toward self or others, and the child's parents are not willing to provide treatment for him/her.[11] (emphasis added).

This standard, if adopted, would eliminate the need for expert testimony on the issue of causation. The psychiatric expert would need only to

determine the emotional condition of the child and his need for care.

Leila Whiting of the National Association of Social Workers takes a similar approach to that of the American Bar Association in her article on defining emotional neglect.[12] She draws a close parallel between the issues of maltreatment and emotional disturbances in children. For her, the total family context and, in particular, the parental response to the child's behavior is the determining factor in diagnosis of emotional neglect:

> ... emotional neglect of a child equals the parents' refusal to recognize and take action to ameliorate a child's identified emotional disturbance.[13]

The authors of two major books on court involvement in child custody disputes take issue with the American Bar Association's efforts. Goldstein, Freud, and Solnit, writing from a psychoanalytic perspective in their book, Before the Best Interests of the Child, maintain that the observed behaviors specified in those standards are not sufficient to assess a child's mental state:

> What appears to be similar behavior, whether as a symptom of illness or a sign of health, may for different persons be a response to a wide range of different and even opposite psychic factors. And the same deep-seated emotional disturbance may lead to the most diverse manifestations in a child's behavior.[14]

In reference to the issue of establishing a causal link between parental behaviors and a child's emotional disturbance, the authors state:

> ... there can be no comparable certainty that the attitudes or the action or inaction of the parents cause these damaging symptoms in the same way that we can be certain of the origins of physical injury. A child can become emotionally disturbed in response to parental attitudes, to fateful events, to a combination of these, or entirely because of internal or inborn factors.[15]

Goldstein, Freud, and Solnit maintain that this uncertainty as to

causation is reflected in a similar lack of consensus concerning treatment, treatability, and prognosis. An expert is therefore also limited in his or her ability to verify the need for court intervention based on parental refusal to provide treatment for the child. According to the authors, psychological therapy for a young child is not likely to be useful and sustained without the parents' willing, not forced, cooperation. Given these difficulties in establishing a definition of emotional maltreatment and the limits of present knowledge regarding treatment and prognosis, these authors recommend restricting court-ordered intervention to situations which can be defined solely in terms of physical harm.[16]

At the Second National Conference on Child Abuse and Neglect (Houston, Texas 1977), representatives of the National Institute of Mental Health joined with those from the National Center on Child Abuse and Neglect in a workshop on defining emotional abuse. The group attempted to list both child behaviors and parental behaviors indicative of maltreatment and to specify the causal links between them (see Appendix 1). In reporting on the efforts of the workshop participants, Lourie and Stefano provide the following comments:

> Attempting to list child behaviors which might indicate that these children are victims of emotional abuse proved to be an even more difficult task than the listing of parental behaviors. It seemed that the best way to link child behaviors to commissive and omissive parental acts was by assessing the impact of the magnitude of parental behaviors. Again, it must be remembered that these child behaviors serve only as tools to help in assessing the dynamic system between parent and child. It is necessary to look at these behaviors within the context of the developmental stage of the child to allow for the exculsion of transient or age-appropriate symptoms.
>
> Allowances must also be made for the <u>invulnerable</u> child who does not exhibit any atypical behavior even though exposed to what is considered a clearly abusive situation.

> We have all come in contact with children who appear to bc living in intolerable conditions but do not seem to exhibit any atypical behavior. So again it seems that we cannot direct our definitions to solely child and/or parental behaviors.
>
> Therefore, the balance between parental behaviors of sufficient duration and intensity and child psychopathology that could be attributed to these observable parental behaviors was seen as an essential element of any clinical definition of emotional abuse.
>
> The strength of the causal link between parental action and child behavior must be brought into perspective. This definition must distinguish between "emotional problems" in children to which we can find some causal parental relationship and "emotional abuse." Otherwise, a case could be made that every disturbed child who walks into a mental health center is emotionally abused.
>
> We cannot just observe the child and/or parental behaviors. Instead, we must examine the severity, duration, balance and causation of parental behaviors, taking into account the environmental conditions surrounding the family. Only in this way will we be able to distinguish the invulnerable child, the emotionally ill child, and, most importantly, the emotionally abused child.[17]

2. "Failure-to-Thrive"

The videotape accompanying this manual presents the testimony of a psychiatrist alleging that the child in question had suffered from "non-organic failure to thrive." The "failure-to-thrive" syndrome has more definite characteristics and is more easily identifiable than emotional abuse in general.[18] "Failure-to-thrive" is indicated when a lack of physical and emotional growth has occurred which cannot be attributed to organic factors. These symptoms imply that nourishment and nurturing have been inadequate in the formation of a bond between a mother and her infant.

"Failure to thrive" is actually the medical term indicating that the child is not growing and developing normally. A social services investigation and possible court action takes place when no physiological

reason can be found for the lack of growth. Sometimes the child is simply not being fed enough. If this is intentional, it has become physical abuse (intentional starvation). Usually, the situation involves parental neglect in that the mother does not pay attention to how often the baby is fed, who feeds the baby, or if siblings are taking the bottle away from the baby.

The psychiatrist's testimony in the videotape reveals that the child involved was previously diagnosed as a "failure to thrive" infant. The child was hospitalized and examined to determine if there existed any physiological basis for his lack of growth. None was found, and he improved with just routine care. Thus, the hospitalization confirmed the "failure-to-thrive" diagnosis. No court proceeding was held at that time, and the child's parents agreed to his being placed temporarily in foster care prior to returning to their custody.

The issue in the trial presented in the videotape concerns whether or not the court should order a second temporary removal of the child from his parents' custody. The child is now age 6 and is allegedly suffering the long-term consequences of the earlier delays in physical development and lack of nurturance. In addition, it is claimed that he is being emotionally abused by his parents in that he is the scapegoat in the family, being blamed for the family's difficulties, and that his emotional needs are being ignored as he appears to be unwanted and unloved. According to the testimony, the child is aggressive at times and in a depressed state as a result of both the current and prior failures of his parents to care adequately for him.

Dr. S.J. Fomon has established criteria to be used in identifying the "failure-to-thrive" syndrome.[19] He emphasizes the importance of

comparative percentiles rather than absolute growth figures, as the child may actually be gaining slightly or maintaining a given weight but still be falling behind normal growth patterns. Harris and Bernstein, in their review of evidentiary issues in "failure-to-thrive" cases, summarize the research findings as follows:

> The "failure-to-thrive" infant classically presents a gaunt face, prominent ribs, wasted buttocks, and spindly extremeties. The child may be vomiting and/or have diarrhea but without high temperature or other indication of viral disorder. He generally pendulates between listlessness and extreme irritability. He rarely if ever smiles, appearing sad and apprehensive.[20]

Some cases of "failure-to-thrive" have purely physiological causation, but most cases are the result of psychosocial nutritional deprivation. Not only do infants have to have proper caloric intake to thrive, but they must also be touched, held, and generally nurtured and cared for in order for proper physical and psychological development to take place.[21]

Because the mother-infant relationship is central to the development of the "failure-to-thrive" syndrome, attempts have been made to identify characteristics of mothers with seriously emotionally neglected children. Harris and Bernstein describe the mother as being almost as needy as the child:

> She is young, usually under twenty-five, and often has several other children. Because she felt rejected in her own childhood, she has very low self-esteem and has an intense need to be "taken care of" herself. She is usually a concrete thinker who did not finish high school... isolated and lonely with little interaction with neighbors or extended family... often unmarried, but if she is married her husband is passive and uninvolved with her or her children. Her depression keeps her from being able to be affectionate with either her spouse or her children. She will commonly admit that she had thought that having babies would cause her to feel loved, but instead has interpreted her infant's crying, soiling, and demands as one more rejection of her, and she has therefore reciprocated and withdrawn from the child. Her major defenses are denial and projection and she acts out under stress as opposed to thinking things through or

> verbalizing about her frustrations. She rarely feels guilty about what is happening to her baby, and when confronted by a social worker or physician, often states that she "had no idea there was anything wrong."[22]

A variety of long-term effects are now being identified which may be anticipated if "failure-to-thrive" is not adequately treated. These include: personality problems and poor school performance; possible emotional disorders, mental retardation, and even autism; the need for speech therapy; and, despite a new nurturing environment, a continuing lag behind average height, weight, and skeletal maturation standards.[23] In addition, failure to appreciate the seriousness of the mother's stress may cause her to move from passive neglect to active abuse as the child grows older.[24]

C. State Action Pursuant to Reported Abuse

1. Investigation

Reports of suspected emotional maltreatment are investigated by representatives of the statutorially designated state agency. Generally, the investigation is made by a child protective services caseworker, who will visit the home and interview the child and his or her parents. From the documentation provided by the reporting parties and impressions garnered during the home interview, the caseworker must decide what course of action he or she will recommend.

The caseworker must first determine whether there is any immediate need to remove the child from the home. Most states permit an emergency removal prior to an adversarial hearing only when the child's physical health or safety is in imminent danger.[25] In order to ascertain what types of services the family may need, the caseworker may decide that psychiatric or psychological examinations should be performed for the

parents and/or the child and that a physical examination of the child should be conducted. Depending upon the caseworker's assessment of the severity of the harm to the child, the parents' potential for rehabilitation, and the parents' willingness to participate in counseling or other services, the caseworker may decide that court intervention is not needed.

Implementation of such an assessment and referral approach presupposes the availability of extensive counseling services. A schematic representation of a model system for integrating corrective counseling services with legal actions was developed at the Second National Conference on Child Abuse and Neglect (see Appendix 2). The operative premise of this system is that, when there are no indications that the child is in immediate danger, the caseworker should recommend the least intrusive alternatives first. If the parents will agree to participate in counseling, that remedy should be tried before recommending court action. If the parents will not participate in counseling, or if the problems persist after counseling, then short-term or long-term removal of the child from the parents' home may be necessary.

If the child has been diagnosed as having emotional problems which require treatment and the parents refuse to seek that treatment, the parents behavior may be considered medical neglect. A typical definition of medical neglect is:

> ... a failure to provide, by those legally responsible for the care of the child, the proper or necessary... medical, surgical, or any other care necessary for his well-being.[26]

A court may be more inclined to intervene on the basis of medical neglect, if the parents' refusal is well documented, than on the grounds of

mental injury. (Note the discussion of Definitional Approaches above.)

2. Court Action

If the parents are unwilling to participate in the recommended treatment plan and the harm or potential harm to the child legally justifies court intervention, the caseworker may refer the case to the local county or district attorney who will petition the court to consider the matter (see Section II.A. below). If the Judge determines, after hearing the evidence presented by the parents and the district attorney (and possibly the child's attorney or guardian ad litem), that the circumstances meet the standards established by law, he or she may order the temporary removal of the child and/or the parents' participation in a program of counseling or other services.

The advantages of trying counseling and in-home supportive services in the hope of rehabilitating the parent-child relationship become most apparent when one considers the potential negative psychological impact on the child of being taken away from his or her parents. The negative effects of the most frequently used alternative, foster care, were examined by Michael Wald, Professor of Law at Stanford University.[27] Wald notes that the prevailing ethic among child care experts is that foster care has been overused as a means of protecting children. He reviews several factors on which this view is based, including: the strong emotional ties children have to their parents, whether or not they could be considered "fit" psychological parents; the identity problems, conflicts of loyalty, and anxiety about their future that children in foster care often experience; the view of some foster children of placement as a punishment for something they did wrong; the variable quality of foster homes; the shortage of foster parent homes, group homes, and good resi-

dential treatment facilities, resulting in children spending weeks or months in impersonal "holding" institutions; the frequent use of multiple placements which prevent the child from establishing continuity in relationships; and the expense of foster care relative to own-home services.[28]

Disadvantages of foster care notwithstanding, in some cases the child clearly cannot be left in the home and temporary foster care is the least detrimental alternative. If after a period of time (often established by statute) the court determines that return to the parental home will never be advisable and that the parents have been given ample opportunity to correct the situation leading to the abuse, proceedings may be initiated to terminate parental rights, thus freeing the child for adoption. Courts, however, are frequently reluctant to terminate the parent-child relationship and have rarely done so on the grounds of emotional maltreatment alone. Many Judges are uncomfortable with severing family ties with no evidence that the child would be in a life-threatening situation if returned. In addition, many state statutes require stricter standards of evidence and a heavier burden of proof in a termination hearing relative to a determination of abuse or neglect. In general, a Judge's decision to temporarily remove a child from the custody of his parents is guided by the child's best interests. Termination of parental rights would require substantial proof of inappropriate parental conduct and/or some present danger to the child. If the child has been removed from his parents' custody and efforts are being made to rehabilitate the parents, every effort should be made to maintain their ties to the child. This is particularly so in those cases where termination of parental rights is unlikely.

In at least one instance, a state supreme court has upheld the

termination of parental rights on the grounds of a specific diagnosis of "failure-to-thrive." In The People of Colorado, in the Interest of C.O.,[29] a case involving the custody of an infant who was twice diagnosed by physicians as having the symptoms of severe "failure-to-thrive", the Colorado court stated:

> After reviewing the full record, we are convinced that C.O.'s failure to thrive was established with a reasonable degree of medical certainty as resulting from malnourishment and the limited ability of A.B.O. [the mother] to satisfy the emotional needs of the child. It was A.B.O.'s responsibility to provide C.O. with a proper diet and to provide the necessary love and affection to satisfy the child's emotional requirements. ...
>
> As we stated [previously]..., parental rights cannot be terminated [in Colorado] unless there is: (1) a history of severe and continuous neglect; (2) a substantial probability of future deprivation; and (3) a determination that under no reasonable circumstances can the welfare of the child be served by a continuation of the legal relationship of the child with the parent. Implicit in the trial court's finding of dependency and neglect based upon evidence of "failure to thrive" is the finding that such neglect is continuous and severe.[30]

3. Treatment Considerations in "Failure-to-Thrive" Cases

A child who is diagnosed as exhibiting "failure-to-thrive" presents a special situation in considering temporary removal from the home. Depending upon the severity of the neglect, the child may require physical treatment, adequate nutrition, and nurture as provided by hospitalization and/or foster care. In fact, it may take hospitalization or foster care placement to confirm the diagnosis.[31] If the environment is changed and significant weight gains and developmental improvements occur with just routine care, it suggests that the environment of the natural parents' home must have been seriously deficient.

According to Harris and Bernstein, the dynamics of the parent-child

relationship are central to any treatment effort, and the necessity for monitoring this relationship is reflected in their suggestions for a "responsible sequence of court judgment":

> (1) Remove the child from the home on a temporary basis if the physician and social worker have convincingly shown that the child is failing to thrive in its natural environment, and improvement has not been shown since the parents have received instruction about the way they should attend to their child;
>
> (2) Order regular (weekly if possible) monitoring of the child's growth by physician and social worker while it is in foster care, and at the same time order parent training and/or therapy for the parents;
>
> (3) When the child is healthy and the parents have shown tangible evidence of attempts to improve their parenting skills, order the child to be returned to the natural parents on a temporary basis. Again, the Judge should order regular monitoring of the child's growth by physician and social worker while the child is in his natural home.
>
> (4) If the child again regresses while in the natural home, removal of the child and permanent placement in an adoptive home may at this point be considered as action in the best interest of the child.[32]

II. LEGAL PROCEEDINGS BEFORE TRIAL

The system of legal pleadings employed by American courts is designed to minimize the element of surprise at trial. This system is structured to achieve two objectives: first, to protect the constitutional right of due process, which requires that the defendant in any action must have a thorough knowledge of the charges against him or her and the time and information with which to prepare an adequate defense; and, second, to minimize the expenditure of valuable judicial time and to help clear overcrowded dockets. "Discovery" proceedings are designed to give all parties to a hearing full information as to the facts related to

the case in order to resolve as many of the issues as possible prior to the actual hearing. Because the expert witness will probably be required to participate in discovery proceedings, it is important that he or she have a general understanding of pre-trial procedures.

A. The Petition and Service of Process

The first requirement of due process is that the defendant, the parent(s) in a maltreatment case, be given "notice" of the nature of the court action. The parents receive notice of the action when a copy of the petition filed with the court by the district attorney is delivered to them. This delivery is called "service of process." A petition will usually contain the following information:

1. the name of the allegedly abused child;

2. the name of the state agency bringing the action;

3. a statement that the named child is being emotionally maltreated; and,

4. the agency's reasons for believing that the child is maltreated.

The charge of maltreatment and the supporting reasons should be sufficiently specific to give the court and the parents an understanding of the issues to be heard.

Service of process can sometimes be problematical if the state cannot locate the parents. Although in-hand delivery or delivery by registered mail is usually required, the court may waive that requirement if the defendants cannot be found. In such cases, alternative notice by publication in the "legals" section of the local newspaper is permitted.

B. Pre-trial Discovery

"Discovery" is the process by which the facts of a case are systematically uncovered and shared by both sides to the litigation. In

theory, two public policy purposes are served by discovery. First, parents are given full knowledge of the case to be presented against them so that they may adequately prepare a response. And secondly, the time that might be spent in court presenting facts that can be agreed upon between the parties is reduced, and sometimes a settlement can be negotiated out-of-court on the basis of these pre-trial negotiations.

But while discovery is theoretically of mutual benefit, it may not always appear to be. The expert witness may regard discovery as harassment by the opposing counsel. With many other professional demands, the expert witness may not have sufficient time to answer numerous written questions (interrogatories), or to appear to give testimony at informal hearings (depositions), or to copy case records. If the demands for information are unreasonable or intrude upon communications claimed to be privileged, the attorney for the oppressed party may seek a protective order from the court. Even if the discovery demands seem reasonable, the expert witness should not respond to discovery requests without first consulting with the attorney on his or her side of the case in order to determine whether any objections need to be raised.

The most common methods if discovery are outlined below:

1. Interrogatories

Interrogatories are written questions generated by one party to the suit and submitted to another party to the suit for a written response. Their purpose is to elicit factual information. The scope of information subject to discovery includes the names of experts which the other party intends to have testify, the subject matter about which the expert will testify, and the substance of the facts and opinions to which the expert will testify. The interrogatory may also request a summary of the grounds

upon which the expert is drawing his or her opinion. (An expert who was informally consulted during an attorney's preparation for trial but not specifically employed by a party is usually exempted from these requirements.)

2. Admissions

Admissions are written requests for "yes" or "no" answers to relevant questions of fact. These often narrow factual matters in contention, and are employed to establish facts not in dispute, e.g., the names and ages of the allegedly neglected children.

3. Depositions

Depositions are exceedingly valuable pre-trial discovery tools because they may be used to question anyone, even persons who are not parties to the suit. Through depositions, attorneys for both sides may examine and cross-examine all possible witnesses prior to the trial.

The taking of a deposition is very similar to the examination of a witness in the courtroom. The party being deposed will be sworn to tell the truth, and the entire proceeding will be transcribed by a court reporter. However, the opposing attorney will usually reserve any evidentiary objections until the actual trial. After the transcript is prepared, the person giving the testimony will be required to examine it and add his or her signature certifying the accuracy of its contents. If subsequent testimony during the trial is not consistent with the testimony given in the deposition, the written record may be used to "impeach" a witness's credibility. Obviously, the expert witness should be as well prepared for giving a deposition as for giving testimony at trial. In addition, the deposed witness should always remember to reread the deposition before presenting trial testimony. There are usually no restric-

tions on the scope of the questions that may be posed when taking a deposition; generally, any question may be asked which is relevant to the material issue in the case. If a deponent objects to a question on the grounds of privilege, he or she may refuse to answer. The deposing attorney may either stop the examination or continue with other matters and wait for a ruling from the court on whether the question must be answered. On matters not involving privileged communications, the deponent or the deponent's attorney may state an objection prior to answering and then await the court's ruling as to the admissibility of the response.

III. THE PARTICIPANTS IN THE TRIAL

A. The Judge

In some states, parents accused of abuse or neglect may demand a jury trial, but they often waive this right. In most cases, it is the Judge who both resolves the factual dispute and interprets the applicable law in reaching a decision concerning the child's custody. In a hearing to determine whether a child should be temporarily removed from his parents' custody, the Judge has substantial control, particularly with regard to the admission of evidence. The Judge knows that very few cases of this type are appealed and even fewer are reversed by a higher court. (However, in those cases in which the parties have deemed it important to have expert testimony, the likelihood of an appeal is greater.)

In practice, the Judge's personal views on parenting and the definition of what constitutes emotional maltreatment will have a major influence on the disposition of the case. A wide range of conduct might be considered "emotional maltreatment" by one Judge, while another Judge may have a considerably narrower definition of what behavior justifies court

intervention. Much may depend on the Judge's perception of the rights of biological parents, appropriate child rearing practices, and the wisdom of judicial intervention into the affairs of families.

Following a determination that the parents have abused or neglected their child, a subsequent phase of the hearing focuses on the disposition of the case. Ideally, the Judge will solicit and consider all of the alternative placements and/or conditions presented to him for decision, recognizing that any disposition may have its disadvantages. Unfortunately, crowded court dockets and a distaste for complex custody cases often combine to afford something less than the ideal consideration of the issues. Further, given the paucity of knowledge about the impact of various dispositions on children, the Judge is confronted with a decision that many child care "experts" would be reluctant to make.

B. The Prosecuting Attorney

The prosecuting attorney (on the videotape, the district attorney) represents the plaintiff state agency. He or she will present evidence intended to establish that the child has suffered emotional harm. The burden of proof in custody cases is on the state, and the innocence of the parents will be presumed until the state has presented sufficient evidence to prove maltreatment. The burden of proof, the degree to which the evidence must be convincing, will vary from state to state. In general, the level of proof required to justify a finding of abuse or neglect and temporary removal of a child is a preponderance of the evidence. This is the standard for most civil cases wherein it appears more likely than not that the parental behavior took place and/or the present danger to the child exists (greater than 50% certainty). Termination of parental rights often requires a higher level of proof by clear and

convincing evidence (equivalent to 75% certainty) or even beyond a reasonable doubt as in criminal cases (about 90% certainty).

In order to establish the state's case against the parents, a collaborative effort is required on the part of the expert witness and the prosecuting attorney. The psychologist or psychiatrist who will act as state's witness in an emotional maltreatment case has a right to expect and demand the opportunity to review his or her testimony with the prosecuting attorney before trial. During this review session, the expert witness should be prepared to explain the significance of his or her diagnosis and treatment efforts. The attorney should then use that information to formulate questions which will best illuminate the expert's knowledge of the subject matter when it is presented at trial.

C. The Parents' Attorney

The attorney for the parents perceives his or her function as follows: to act as a spokesperson for the often inarticulate parents; to demand impartiality from the Judge (courts, as established institutions, often have a natural preference for the state); to assure that basic elements of fairness (due process) are observed; to insure that facts favorable to the client are presented, and that unfavorable evidence is questioned; and to test the expertise of any expert witnesses offering opinions contrary to his clients' interests.

The attorney for the parents is ethically bound to represent their best interests and to present evidence putting them in the best possible light. The nature of the adversarial proceeding inevitably casts the defense attorney in the role of attacking the credibility of the state's witnesses, including the expert witness. Techniques for responding to the cross-examination by an opposing attorney are discussed in the materials

below.

D. The Child's Attorney or Guardian Ad Litem

In some states, an attorney ad litem or guardian ad litem will be appointed to represent the interests of the child alleged to have been maltreated. The attorney or guardian's role is to make an independent (of the state's interest and the parents' interest) investigation and presentation of the facts in the case. The child's attorney may advocate for a disposition of the case which reflects the child's preference concerning placement. A guardian ad litem will make an independent determination of what is in the child's "best interests" and urge that the court follow that recommendation. From the point of view of the court, the attorney or guardian ad litem's role is to insure that all the relevant facts are presented.

E. The Parents

While emotional abuse is not unique to the poor, state-initiated litigation is more likely to arise as a result of contacts between social service workers and their clients who are on public assistance. Whether or not class or racial bias is really present in any particular case, it is likely to be raised by defense attorneys who represent such parents.

The fact that the parents are willing to fight to retain their children indicates they place significant importance on the maintenance of the family. The parents may be poor, unemployed, and receiving public assistance payments, and the relationship between the spouses may be viewed as unstable or unusual from a middle-class perspective. When such parents appear in court, they are usually fearful and intimidated by the formality and public scrutiny. Their ideas about the legal system have probably been formed by their exposure to television lawyers and perhaps

by negative personal experiences. The fact that they are willing to face this fear and enter the courtroom speaks to the importance they place on the issue. However, their motivation for contesting the adjudication of abuse or neglect may also be self-defensive, selfish, and unrealistic.

IV. THE PSYCHIATRIC EXPERT WITNESS AT TRIAL

The videotape depicts the direct testimony elicited by the district attorney and the cross-examination by the parents' attorney of a psychiatrist called as a witness by the state. A trial is an adversarial event. The attorneys for both sides will call witnesses and present evidence in an attempt to persuade the court to decide in their favor. The very nature of the trial process insures that the expert witness will be subject to efforts designed to undermine his or her credibility.

The videotape provides information about courtroom procedures and rules of evidence. It was designed to help the potential expert witness become more familiar with the legal system and thus reduce the apprehension associated with having to testify. The videotape also emphasizes the importance of accurate and properly prepared case records. Well-prepared, documented, and relaxed testimony should present a more accurate picture of the facts of a case. The materials which follow are intended to complement the videotape presentation by further familiarizing the potential expert witness with courtroom procedure and suggesting various strategies for preparation and actual testimony.

A. What is an Expert Witness?[33]

Ordinarily, a witness is prohibited from testifying about anything other than personal observations. However, because of expert witnesses' specialized knowledge or experience, this does not apply. Expert

witnesses are called before the court precisely because, in their particular areas of expertise, they can reach conclusions beyond the skill of the Judge or jury. Therefore, expert witnesses are permitted to state opinions and make inferences in their areas of expertise while lay witnesses are not. As with other evidence, the Judge weighs the expert's testimony and may disregard it (except where statutes require its use).

An expert witness is any person who, in the Judge's opinion, possesses sufficient knowledge to aid the court in making a valid determination. An expert witness need not be world-renowned and need not have published articles or books. The witness may have gained superior knowledge from practical experience, formal education, or a combination of the two.

The expert need not be the "best" expert on the subject; nor is it required that the expert's views reflect only those that are accepted in the field. If the witness belongs to a controversial school of professional thought, she or he may still qualify to express expert opinions. The Judge will determine to what extent those opinions are to be relied upon in reaching a decision.

In addition to experts called by the parties in a case, the court itself may appoint an expert witness. Even though courts' experts are not associated with either side in litigations, they must be qualified and may be cross-examined by both parties.

Experts may offer opinions in the area of their expertise only. For example, a radiologist may express opinions regarding the child's x-rays and the possible cause of injuries. A psychiatrist may discuss professional opinions regarding the prognosis for the parents' mental condition. Outside their specialties, expert witnesses are on the same footing as lay witnesses.

Expert testimony is most commonly used when the evaluation and understanding of facts depend on specialized training. Here the expert's opinion is required, since an ordinary person cannot draw accurate inferences. Social sciences, as well as natural and physical sciences, frequently require expert testimony. A witness may not give opinion evidence as an expert if the Judge believes that the state of the art in the field does not permit a reasonable opinion to be asserted even by an expert.

B. Qualifying as an Expert Witness

The party offering the expert's testimony must prove to the satisfaction of the court that:

1. The subject matter is an area where the Judge or jury will require expert assistance; and,
2. This particular person is sufficiently qualified to provide assistance.[34]

As illustrated by the videotape, the attorney calling the expert witness will ask the witness to describe his or her educational background, area of professional practice, and specialized training. The preparation of a vita or resume for submission to the court can be very helpful in establishing the witness's qualifications. It may include degrees earned, professional publications, and membership in professional societies or organizations. Nothing precludes the expert from taking the initiative and furnishing the attorney with a resume well in advance. In addition, the expert could provide a list of questions for use in establishing his or her qualifications and request a pre-trial role-play session with the attorney.

The opposing attorney then has the right to question the expert

concerning his or her qualifications. A well-recognized figure may not be challenged. However, experts who are not as well known should anticipate challenges to their credentials and should be prepared to overcome doubts raised by the opposing side.[35]

Some of the possible challenges that an expert witness might face are illustrated on the videotape. The parents' attorney attempted to imply class and racial bias and to discredit the psychiatrist's expertise by asking whether she had read specific works, had published widely, or had attended specialized professional conferences. If the witness is able to preserve an attitude of dignity and detachment throughout the testimony, such challenges will likely be regarded as spurious by the Judge.

The opposing attorney may attempt to have the expert's testimony excluded, claiming a breach of confidentiality as protected by the physician-patient or therapist-patient relationship. There are certain classes of communications between persons which the law will not permit to be divulged and will not allow inquiry into during a judicial proceeding, unless the person whose communication is being protected voluntarily waives the privilege. In order to make available all relevant evidence in a judicial proceeding, the laws of most jurisdictions make these legal restrictions on divulging confidential information <u>inapplicable</u> in child abuse and neglect cases.[36] However, in at least one state, <u>unless</u> the psychiatric examination is ordered by the court, the psychiatrist may be liable for a suit by the client if he or she testifies concerning information conveyed in an examination without first obtaining the client's informed and voluntary release.[37]

Opposing counsel may also attempt to discredit the witness's testi-

mony by alluding to the expert's financial relationship with the state. The expert may counter these charges of partiality and financial gain by citing previous cases in which the expert's recommendations were at odds with those of the state agency and by clarifying the net loss financially in giving up time from private practice to participate in the hearing. The expert may wish to request that his or her testimony be required by subpoena from the court. If subpoenaed, the expert may appear to the family as a neutral witness rather than as the representative for the state in order tc enhance the expert's ability to continue to work with the family after the court proceeding. Other discrediting techniques which may be employed by the opposing counsel include: (1) citing prior inconsistent statements or positions on the part of the expert witness; (2) citing publications which state a contrary view; or (3) raising an ethical challenge that the therapist has manuevered the client into a position of trust only to testify against the client at the time of trial.

C. The Psychiatric Report and Presentation of Testimony

A well-organized psychiatric report written with a minimum of technical jargon is the ideal format for presenting and documenting testimony. The psychiatric report and the testimony based on it should include at the outset the following basic information:

1. An introduction which states the parent's or child's name, the reasons for their being in treatment or an explanation of why the examination was requested, and the length of time, with dates, the individual has been in treatment or under observation;

2. The nature of the problem, described in reasonably standard English, on the assumption that reports are meant to furnish information to the court; any psychiatric diagnosis should conform to the specifications of the American Psychiatric Association Manual (DSM-III);[38]

3. A summary of the history of the problem up until the time of treatment or examination;

4. A description of the behavior and verbalizations observed by the psychiatric expert upon which the diagnosis is based; the expert should be prepared to give a rationale for the methods employed and specific reasons for the conclusions reached;

5. Ancillary information contributing to the diagnosis gathered from sources other than the parent or child being examined; and,

6. Opinions and recommendations concerning the need for further treatment.

In addition to this standard psychiatric history and diagnosis format, the expert's report and testimony should reflect the specific types of information required by the proceedings at hand.[39] Often, the expert reaches a conclusion concerning diagnosis without connecting the psychiatric determination to the legal decisions facing the court. Some position should be taken, for example, concerning the removal of the child from his parents, whether the parents should maintain visitation, and whether the parents can be rehabilitated (depending upon whether the expert has examined the child or the parent or both). Despite the limitations on predicting future behaviors, the expert should describe the probable consequences to the child of returning to his parents, if already in substitute care, and how likely the parent's episode(s) of abuse are to be repeated.

In preparing for courtroom testimony, the psychiatric expert should become familiar with the statutory definition of emotional maltreatment for that state. The type of testimony required will depend upon whether the definition focuses on the behaviors and intentions of the parents, the condition and/or behaviors of the child, a causal relationship between the two, or a continuing danger to the child (see the discussion of

Definitional Approaches, Section I.B.(1) above).

Any conclusion concerning the condition or diagnosis of the parent(s) should specify the types of parental behaviors to be expected with respect to the child. The expert should assess separately the ability of the parents to manage their own lives and their ability to care for their child and any special needs that child may have. This assessment should include whether the parents have the requisite attention, energy, and external supports to handle the parenting responsibilities and whether they are capable of appropriate discipline. If the parents are not at present capable of meeting their child's needs appropriately, some estimate should be made of a possible time frame for their education, rehabilitation, and/or the provision of additional supportive services which would permit them to regain custody of their child.

Any conclusions concerning the condition or diagnosis of the child should describe the types of problem behaviors that the child is exhibiting and how these compare to other children at a similar developmental stage. Many children may appear hyperactive, aggressive, or depressed at times, so it is important to explain why these behaviors can be considered abnormal for a given child. The expert should also address what types of remedial services are required to minimize the consequences of the abuse for the child's continued emotional development.

After the Judge determines that the expert's opinions are admissible, the attorney offering the testimony questions the expert. First, it must be shown that the expert is familiar with the facts, either by having been present in the courtroom when evidence was presented, by firsthand knowledge, or by reading pertinent records and files.

A conscientious attorney will review the testimony with the expert

witness prior to the hearing. It is difficult enough for the witness to field the questions asked on cross-examination without having to cope with unexpected points brought up on direct examination. Both the attorney and the expert witness need to know not only the answers, but also the questions designed to elicit those answers.

In situations where the expert has no firsthand knowledge of the case and has made no independent investigation, questioning is in the form of hypothetical questions. In a hypothetical question, the attorney asks the expert witness to assume that certain evidence is true as presented and then to draw a conclusion based on these assumptions.

It is the opponent's responsibility to cross-examine the expert about premises and facts relied upon and to bring out any inconsistencies, unorthodox theories, or incomplete considerations. The opponent may ask the expert for an opinion based upon the opponent's version of the facts in the case, and may or may not use hypothetical questions.

An expert's testimony can be contradicted by other experts who arrive at different conclusions. The Judge or jury must then decide which expert is more credible.

Medical records which have been admitted into evidence (see discussion of the Hearsay Rule below) may be used by the witness to refresh his or her memory during testimony. The expert may also use personal memoranda not admitted into evidence if they were made at or near the time of an event. The witness should be aware, however, that the opposing attorney has the right to inspect these memoranda. Any information which the expert is unwilling to have made available should not appear in these personal notes.

If the expert's diagnosis is based in part on the results of psycho-

logical tests administered to a parent or the allegedly emotionally maltreated child, the results of those tests should also be included in the testimony. But if testimony is to include standardized test results, the expert witness should be prepared to respond to the criticisms most frequently leveled against such tests. Specifically, the witness should be familiar with the adequacy of test construction, the limitations of generalizing from one population to another, the degree of subjectivity involved in evaluating certain test results, and the availability or unavailability of data on the validity or reliability of the tests in question.[40]

D. Evidentiary Objections

1. The Hearsay Rule (and Medical Records)

The rule excluding hearsay evidence and some if its numerous exceptions are demonstrated in the videotape presentation. The essence of the rule is that only those who actually witness a particular event or communication may testify as to what occurred or was said. Hearsay is oral or written evidence which is not based on the witness's own personal knowledge or observation but on something said or written by someone who is not available to the court. If the actual witness to a statement or event is not available for cross-examination by the opposing counsel, the reliability of this secondhand information cannot be determined.

Records, including medical records, which are kept in the course of business are an exception to the hearsay rule and thus may be admitted as evidence. For a record to qualify as evidence, the entries must be made:

1. in the regular course of business (and it is the practice to make and keep such records);

2. at, or reasonably close to, the time the event occurred; and,

3. by someone who has personal knowledge of the facts or by someone who is responsible for making entries and has communicated with someone who did have personal knowledge.[41]

In order to admit a record as evidence, a witness who is familiar with the procedure for creating the record is called to testify. In his or her testimony, the witness must:

1. identify the record;
2. describe the method of preparing the record;
3. state the time of preparation of the record; and,
4. verify that recordkeeping is a regular part of the business operations.[42]

In the videotape, the parents' attorney is particularly effective in utilizing the hearsay rule to keep some important evidence from being admitted. This is illustrated when the district attorney attempts to introduce into evidence hospital records that were not prepared by the witness. The Judge sustains the parents' attorney's hearsay objection. This demonstrates poor preparation on the part of the district attorney. The medical records could have been admissible if the district attorney had requested the hospital custodian of the records to appear to testify or prepare an affidavit describing the recordkeeping procedure of the facility.

2. Leading Questions

A leading question is one so fashioned by the attorney that it suggests the answer to the witness. It is permissible to ask leading questions on cross-examination, but a witness called by an attorney may not be led on direct examination. This may cause some confusion, as the same question may be objectionable in one context, and perfectly acceptable in another. However, even when appropriate, the objection is more

theoretical than real; sustaining the objection merely results in a rephrasing of the question -- and the answer has already been suggested. Skillful use of leading questions by opposing counsel can be disconcerting -- provided the fine line between leading and badgering, harassing or being argumentative is not breached.

E. Courtroom Demeanor

The testimony of the expert witness is given in response to questions from the prosecuting attorney and the defense attorney. The witness for the state will respond first to the prosecuting attorney on direct examination, then to the defense on cross-examination. If the case has been thoroughly reviewed with the prosecuting attorney, there should be no surprises on direct examination. The attorney's questions should be structured to allow the witness to present his or her information in a clear and straightforward manner. The parents' attorney may use objections to control the input of evidence: to slow down, disrupt, and confuse a witness whose testimony is flowing smoothly. Objections may be used in an attempt to harass, frighten, and disorient a witness. The expert witness must expect such tactics and be prepared to maintain his or her composure.

Cross-examination affords an attorney an opportunity to weaken, undercut, or disprove the direct testimony of an adverse witness. It is seldom the dramatic confrontation depicted on television or in the movies. Nonetheless, the game-playing aspects of trial law do reach their heights during cross-examination. Careful preparation and a cool head are the best defense.

Adherence to the following tips on courtroom demeanor should carry the expert through direct and cross-examination with maximum credibility:

1. Speak slowly, loudly, and clearly.

2. When you must use professional terms, define them carefully so that the Judge and attorneys will understand. Explain a diagnosis in terms of symptoms. Be prepared to discuss the details of child and/or parent behavior that substantiate the diagnosis.

3. Strive for impartiality. Both positive and negative aspects of parental behavior should be mentioned. Avoid making unsubstantiated inferences about parental behavior.

4. Respond to questions as they are posed. If a general or hypothetical question is posed, respond first with a general or hypothetical answer. If a question is asked in several parts, respond to each part separately.

5. If you do not understand a question, ask that it be repeated or restated.

6. If you are asked for a "yes" or "no" answer that could be misleading, you may refuse to answer the question, but explain your reasons. If necessary, appeal to the Judge.

7. If you do not know the answer to a question, say so.

8. If experts in your field disagree about issues in your testimony, be prepared to explain and defend your conclusions.

9. Remain calm and defend your assertions with facts; avoid permitting the cross-examining attorney to goad you into argument.

10. If an objection to your testimony is raised by either attorney, stop speaking immediately and wait for a ruling by the Judge. If the objection is sustained, you may not respond, and must wait for the next question. If the objection is overruled, you must answer the question.

11. If the cross-examining attorney asks whether you have discussed

your testimony with opposing counsel, admit that you have. While the cross-examiner may attempt to insinuate that such consultation damages your credibility, it is a routine part of proper preparation for trial.

ENDNOTES

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8. Model Child Protection Act With Commentary, Draft, U.S. Department of Health, Education, and Welfare, Children's Bureau, August 1977, Sections 4(b) and (c), pp. 4, 6.

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19. S.J. Fomon, cited in J.C. Harris and B.E. Bernstein, Ibid.

20. J.C. Harris and B.E. Bernstein, supra Note 18. Also see: Visual Diagnosis of Non-accidental Trauma and Failure to Thrive, an audiovisual presentation available from the Region VIII Child Abuse and Neglect Resource Center, 1205 Oneida Street, Denver, Colorado 80220.

21. J.C. Harris and B.E. Bernstein, supra Note 18. Also see: B.D. Schmitt, supra Note 18.

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25. See for example: Texas Family Code, Sections 17.02 and 17.03.

26. National Center on Child Abuse and Neglect, supra Note 3, p. 5.

27. M.S. Wald, "State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights," Stanford Law Review 28:4 (1976): 623-706.

28. Ibid., pp. 644-646.

29. 36 Colo. App. 298, 541 P.2d 330 (1975).

30. Ibid., p. 332.

31. J.C. Harris and B.E. Bernstein, supra Note 18.

32. Ibid.

33. The description of what constitutes expert testimony is taken from:

H.R. Landau, M.K. Salus, T. Stiffarm, and N.L. Kalb, Child Protection: The Role of the Courts, National Center on Child Abuse and Neglect, The User Manual Series, (Washington, D.C.: U.S. Government Printing Office, DHHS Publication No. (OHDS) 80-30256, May 1980), pp. 53-55.

34. Ibid., p. 54.

35. Ibid.

36. National Center on Child Abuse and Neglect, supra Note 28, p. 14.

37. See: Vernon's Texas Civil Statutes, Article 5561(H), effective August 27, 1979.

38. Diagnostic and Statistical Manual of Mental Disorders, 3rd ed., American Psychiatric Association, 1700 18th Street, N.W., Washington, D.C. 20009, 1980.

39. The following suggestions concerning the content of the expert's report and testimony is based on the author's conversation with Mark Hardin, Assistant Director, National Legal Resource Center for Child Advocacy and Protection, Washington, D.C., January 14, 1981.

40. For an excellent discussion of the legal challenges which can be made against psychiatric testimony, see:

J. Ziskin, Coping with Psychiatric and Psychological Testimony, 2nd ed., (Beverly Hills: Law and Psychology Press, 1975); also see: B. Ennis and T. Litwack, "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom," California Law Review 62 (1974): 693.

41. Landau et al., supra Note 33, p. 37.

42. Ibid., p. 38.

APPENDICES

Appendices 1 and 2 originally appeared in:

I.S. Lourie and L. Stefano, "On Defining Emotional Abuse: Results of an NIMH/NCCAN Workshop," in Child Abuse and Neglect: Issues on Innovation and Implementation, Proceedings of the Second Annual National Conference on Child Abuse and Neglect, April 17-20, 1977, Vol. I, in M. Lauderdale, R. Anderson, and S. Cramer (eds.), (Washington, D.C.: U.S. Government Printing Office, DHEW Publication No. (OHDS) 78-30147, 1978), pp. 205-207.

APPENDIX 1

Parental Behaviors Which Threaten Mental Injury to a Child

PARENT BEHAVIOR	CHILD BEHAVIOR	
ABUSIVE IF CONSISTENT GROSS FAILURES TO PROVIDE	TOO LITTLE	TOO MUCH
1. Love (empathy) (Praise, acceptance, self-worth)	1. Psycho-social dwarfism, poor self-esteem, self-destructive behavior, apathy, depression, withdrawn	Passive, sheltered, naive, "over self-esteem"
2. Stimulation (emotional/cognitive) (talking-feeling-touching)	2. Academic failure, pseudo-mental retardation, developmental delays, withdrawn	Hyperactivity, driven
3. Individuation	3. Symbiotic, stranger and separation anxiety	Pseudo-maturity
4. Stability/permanence/continuity of care	4. Lack of integrative ability, disorganization, lack of trust	Rigid-compulsive
5. Opportunities and rewards for learning and mastering	5. Feelings of inadequacy, passive-dependent, poor self-esteem	Pseudo-maturity, role reversal
6. Adequate standard of reality	6. Autistic, delusional, excessive fantasy, primary process, private (unshared) reality, paranoia	Lack of fantasy, play
7. Limits, (moral) guidance, consequences for behavior (socialization)	7. Tantrums, impulsivity, testing behavior, defiance, antisocial behavior, conduct disorder	Fearful, hyperalert, passive, lack of creativity and exploration
8. Control for/of aggression	8. Impulsivity, inappropriate aggressive behavior, defiance, sadomasochistic behavior	Passive-aggressive, lack of awareness of anger in self/others
9. Opportunity for extrafamilial experience	9. Interpersonal difficulty (peer/adults), developmental lags, stranger anxiety	Lack of familial attachment, excessive peer dependence

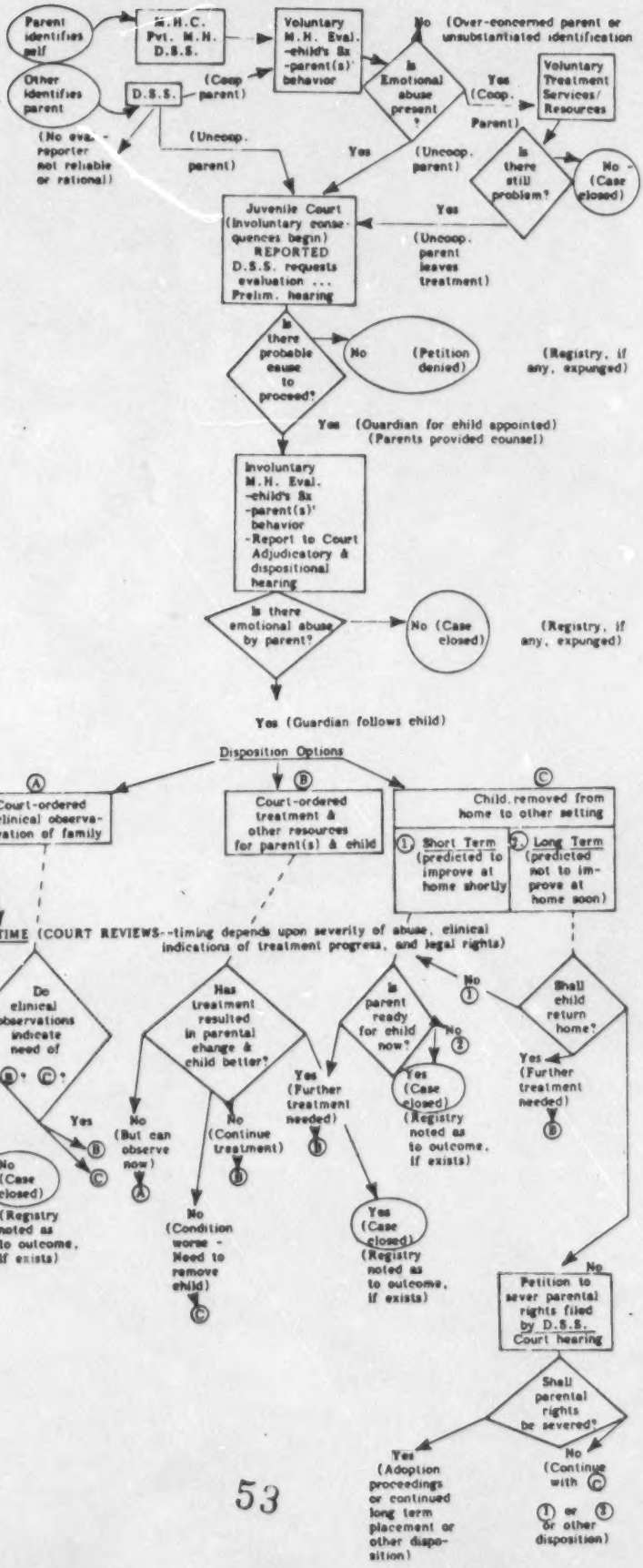
10.	Appropriate (behavior) model	10. Poor peer relations, role diffusion, (deviant behavior, depending on behavior modeled)	Stereotyping, rigidity, lack of creativity
11.	Gender (sexual) identity model	11. Gender confusion, poor peer relations, poor self-esteem	Rigid, stereotyping
12.	(Sense of) (Provision of) security/safety	12. Night terrors, anxiety, excessive fears	Oblivious to hazards and risks, naive

ABUSIVE IF PRESENT TO A SEVERE DEGREE

1.	Scape-goating, ridicule, denigration	1.	Poor self-esteem, depression
2.	Ambivalence	2. Rigidity	Lack of purpose, determination, disorganization
3.	Inappropriate expectation for behavior/performance	3. Poor self-esteem, passivity	Pseudomaturity
4.	Substance abuse	4. (Depends on behavior while intoxicated)	
5.	Psychosis	5. (Depends on behavior/type/frequency)	
6.	Threats to safety/health	6.	Night terrors, anxiety excessive fears
7.	Sexual abuse	7.	Fear, anxiety, withdrawn, pseudosexuality, hysterical personality
8.	Physical abuse	8.	Sadomasochistic behavior, low self-esteem, anxiety, passivity, anti-social behavior, self-destructive dangerous behavior
9.	Threatened withdrawal of love	9.	Anxiety, excessive fear, dependency
10.	Shaming	10. "Lack" of superego, conscience	Excessive superego, self punitive
11.	Exploitation	11. (Depends on behavior/frequency)	

APPENDIX 2

Example of a System/Law
Developed by Lauer and Hall


Parent identifies self
Other identifies parent
M.H.C. Pvt. M.H. D.S.S.
D.S.S.
(Coop parent)
(No eva. - reporter not reliable or rational)
(Uncoop. parent)
Voluntary M.H. Eval. -child's Sx -parent(s)' behavior
No (Over-concerned parent or unsubstantiated identification
Is Emotional abuse present ?
Yes (Coop. Parent)
Voluntary Treatment Services/ Resources
Is there still problem?
No - (Case closed)
Yes (Uncoop. parent)
Juvenile Court (Involuntary consequences begin) REPORTED D.S.S. requests evaluation ... Prelim. hearing
Yes (Uncoop. parent leaves treatment)
Is there probable cause to proceed?
No (Petition denied)
(Registry, if any, expunged)
Yes (Guardian for child appointed) (Parents provided counsel)
Involuntary M.H. Eval. -child's Sx -parent(s)' behavior -Report to Court Adjudicatory & dispositional hearing
Is there emotional abuse by parent?
No (Case closed)
(Registry, if any, expunged)
Yes (Guardian follows child)
Disposition Options
A
Court-ordered clinical observation of family
B
Court-ordered treatment & other resources for parent(s) & child
C
Child removed from home to other setting
1. Short Term (predicted to improve at home shortly
2. Long Term (predicted not to improve at home soon)
TIME (COURT REVIEWS--timing depends upon severity of abuse, clinical indications of treatment progress, and legal rights)
Do clinical observations indicate need of B+ C+
Yes B C
No (Case closed)
(Registry noted as to outcome, if exists)
Has treatment resulted in parental change & child better?
No (But can observe now) A
No (Continue treatment) B
No (Condition worse - Need to remove child) C
Yes (Further treatment needed) B
Is parent ready for child now?
No 1
No 2
Yes (Case closed)
(Registry noted as to outcome, if exists)
Yes (Case closed)
(Registry noted as to outcome, if exists)
Shall child return home?
Yes (Further treatment needed) B
No
Petition to sever parental rights filed by D.S.S. Court hearing
Shall parental rights be severed?
Yes (Adoption proceedings or continued long term placement or other disposition)
No (Continue with C 1 or 3 or other disposition)